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No. 1043

In the

Supreme Court of the United States

October Term, 1963

JOHNNY WALKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. ——

JOHNNY WALKER,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Johnny Walker[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on February 4, 1963 in a proceeding entitled United States of America, Plaintiff-Appellee v. Johnny Walker, Defendant-Appellant, Appeal from the United States District Court for the Southern District of Ohio, Western Division.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is printed as Appendix hereto. It has not yet been officially reported.

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[1] Referred to herein as "petitioner" or "defendant".

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered February 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. #1254 (1) and 28 U.S.C. Supreme Court of the United States Revised Rules, Rules 21, 22 and 23.

QUESTIONS PRESENTED

I. Is the United States of America permitted to introduce rebuttal testimony from two city policemen unconnected with the case at bar for the purpose of attacking the defendant's reputation for truth and veracity when—

A—The defendant has not put his general reputation in issue?

B—The policemen's testimony was not based on community or neighborhood opinion?

C—The policemen were not asked if they actually knew of defendant's reputation but only if they had the means of knowing?

II. Is it permitted to further elicit from police rebuttal witnesses, so deficiently qualified, the further question as to whether or not they would believe the defendant under oath?

III. Is it incumbent upon the District Court to instruct the jury that the indictment is not evidence?

IV. Is it incumbent upon the District Court to instruct the jury that if the evidence fails to convince it of defendant's guilt beyond a reasonable doubt that it is to return a verdict of "Not Guilty" or "Acquittal"?

V. Is The District Court permitted to instruct the jury as to the mode of its deliberations?

STATEMENT

This petition seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of the United States District Court for the Southern District of Ohio, Western Division.

Petitioner was indicted in Criminal Case Number 10113 on January 22, 1962 and charged in a five counts indictment with violating Title 18 Section 2314, the gist of the offenses being the willful interstate transportation of falsely made checks. A plea of Not Guilty was entered by the petitioner and he was found Guilty on the first four counts by the jury, the government having previously requested the Court to dismiss the fifth count. The petitioner testified in his own behalf, strenuously contradicting the testimony of the government witnesses, and the defense offered no other witnesses, in the defendant's case. After the defense rested its case the government called two rebuttal witnesses, a sergeant of police and the assistant police chief of the Cincinnati Police Department, who testified they had the means of knowing the general reputation for truth and veracity of petitioner and that it was bad. It will be noted here that there was no testimony received into the record that this was a community or neighborhood reputation, even as it must be noted that the necessary operating question of whether the officers did in fact have such knowledge was neither asked nor answered.

Counsel for the defendant vigorously objected to the introduction of the aforementioned rebuttal testimony, but was overruled by the trial court. The trial court imposed a five year sentence and appeal was taken on the defendant's contention that the trial court committed prejudicial error in permitting the government to introduce the aforementioned rebuttal testimony and for other prejudicial error contained in the court's charge to the jury.

—all of which deprived the defendant of his constitutional right to a fair and impartial trial.

DECISION OF THE COURT OF APPEALS

The Sixth Circuit Court of Appeals by order dated February 4, 1963 affirmed the judgment of the District Court, drawing a distinction between attacking a defendant's general reputation for truth and veracity and assailing his character in general. When the point was pressed in a Petition for Rehearing that the presence of policemen went beyond the restricted area of truth and veracity and created a cloud on his general character — and that said policemen were in fact not adequately qualified as rebuttal witnesses, since certain central questions were not asked nor answers recorded as to *how* they acquired their "means of knowing", —the Sixth Circuit by order dated March 25, 1963 denied the Petition for Rehearing on the ground this contention was made for the first time in said Petition.

It is the contention of this Petition in this Court that the objections of trial counsel, both as to the person and the testimony of the policemen were adequate to protect the right of review on this score.

REASONS FOR GRANTING THE WRIT

The Petitioner states he has been deprived of his constitutional right to a fair and impartial trial because of the admission of improper rebuttal evidence and because of certain errors in the charge to the jury given by the District Court.

Petitioner further states that because of the foregoing he will be deprived of his liberty without due process of law, all in violation of the Fifth Amendment to the United States Constitution.

ARGUMENT I

a—When the defendant's character is not in issue.

The introduction of policemen, completely unconnected with the case at bar, for the ostensible purpose of Truth and Veracity opinion only, jeopardizes a defendant's rights since the very presence of policemen implies some prior police envolvement. They are not necessary witnesses, but so-called reputation-rebuttal witnesses, deliberately selected stage dressing, calculated to have only one effect on the jury, an effect, which the law seeks to safeguard against when made openly.

It is simply unrealistic to pretend that their profession is an unplanned coincident and that the jurors will confine their conclusions to the restricted question of Truth and Veracity and not let their thoughts stray into the general field of general character, — which is not at issue and is theoretically protected, — by asking themselves, "How is it that policemen know so much about him?" If several doctors, specializing in contagious disease, were asked these same questions, can anyone doubt but that the health issue would become involved in the jurors' minds?

What cannot be done by the front door should not be done by the back door. Here were two policemen, headquarter's men, one a sergeant and the other a Colonel who was both assistant Chief of Police and Chief of Detectives. They gave no evidence of having any contact with the defendant's community or neighborhood, as we must admit, perhaps a district policeman on the beat or a precinct officer might have done.

What reaction could the jurors take other than the invited reaction, — namely visions of police records, finger print records, prison record cards, cards of identity, lie detectors and the over-all impression of criminality? Other-

wise, the jury most logically, will reason, why should the assistant Chief of Police leave City Hall and come over to testify in a Federal case unless there was something more to this case than whether or not the defendant always told the truth? The local candy store man could have done that.

The law throws a protection against attempts to drag in other involvements with the law enforcement for purpose of coloring the case at bar. It is not ordinarily permissable for a party to bring out the fact that a witness has been charged with; accused of; or arrested or indicted for a crime, of which he is not shown to have been convicted.

"Public or Private Detectives, Informer or Police: Witnesses, who have been hired by the party, for whom they testify, to procure evidence or to work up the case as investigators, are interested and their credibility is affected thereby." Thus 98 Corpus Juris Secundum, Witnesses, 503, Accusation, Arrest or Indictment for Crime.

Furthermore in *State* v. *Miller*, 72 Wash. 174, "Detective or other stranger sent out to learn the character of the witness should not be permitted to testify as to the result of his inquiries."

Closer to the problem in the present case is the position taken in *State* v. *Baker*, 249 S.W. 2d 75, Sup. Ct. Mo. 1923 wherein the Court rejected an attempted showing that the defendant was under surveillance, holding that this was "a thinly veiled attempt to attack defendant's character."

b—When there is no showing that proffered rebuttal testimony is based on community or neighborhood opinion.

In general: "It is the universal and well settled rule that a discrediting witness must be acquainted with the character or reputation of witness whom he is called to impeach among his neighbors or general associates and that he is incompetent where his knowledge is confined to

private reputation existing among a few people." 98 Corpus Juris Secundum, Subject, Witnesses, p. 445, 446.

The opinion of one trade or profession is not enough. Thus in *F. W. Stock* v. *Dillapenna*, 217 Mass. 503 where an impeaching witness testified that a witness' reputation "was poor among the flour trade" and another that "he had no other information than what he had gained by inquiring from people connected with the flour trade" the court held neither was qualified to testify as to general reputation of such witness for truth and veracity.

Taylor v. *Ryan*, 15 Neb. 573, treating an impeaching witness attacking truth and veracity, stated: "In the case of *Mathewson* v. *Burr*, 6 Neb. 312, this Court, in the opinion of Chief Justice Lake, says: 'In this mode of impeachment it is not competent to show what two or three persons say concerning the witness, but the inquiry must be confined to the general estimation in which he is held by his neighbors and acquaintances. Nothing short of this will answer.' Under this rule thus correctly stated, the testimony was properly suppressed. I will add that the impeachment of witnesses, by the testimony of other witnesses, as to character, is not greatly favored by the law; and if a party pursuing it should not, in all cases, be held strictly and technically to the rule of evidence in such cases, he should be held to the spirit of it."

As to policemen: In *People* v. *Billings*, 372 Ill. 433; 24 N. E. 2d 339, the court in most definite language stated that an inquiry of a police officer as to whether he knew the general reputation of the accused for truth and veracity should have been amended to whether the officer knew the general reputation of accused for truth and veracity in the neighborhood where he resided.

Also in *Khan* v. *Zemansky*, 59 Cal. App. 324, the court held that police testimony may be excluded when it is

not shown that it is based on knowledge of general reputation in the community.

Finally, in *Bradley* v. *Commonwealth*, 196 Va. 1126; 86 S.E. 2d 878 a sheriff was permitted to testify. There however, the sheriff knew the defendant for a number of years and in accepting his testimony the court said:

> "One of the universally recognized methods of impeaching a witness is to show his bad general reputation for truth and veracity in the community where he lives or among his neighbors or acquaintances, by witnesses who know that reputation. . . . The proper mode of examining the witness called to impeach another who has testified in the case, is to inquire whether he knows the general reputation of the person in question among his neighbors and acquaintances and when this question is answered in the affirmative he may state whether the reputation is good or bad."

Reference to the direct examination of Mr. Charles Denham, the police sergeant, and Colonel Henry Sandman, assistant Police Chief and Chief of Detectives of the Cincinnati Police Department as set forth in the *Transcript of Testimony and Proceedings* in the *Petitioner's Appendix* clearly shows that no reference is made to neighborhood or community estimation whatsoever.

c—Where the rebuttal witness fails TO STATE that he actually has personal knowledge of the accused's reputation.

Reference to the same Direct Examination referred to above in *Petitioner's Appendix* will show that both Sergeant Denham and Colonel Sandman were asked:

> "Do you have the means of knowing what Mr. Walker's general reputation for truth and veracity is?"

It will also show however, that neither was asked if they actually had knowledge, or actually knew of Mr. Walker's reputation. The important middle-step question and answer are not to be found, i.e.

"Based on this 'means of knowledge' do you have personal knowledge of his reputation?" It is obvious that "having means of knowing" is not the same as "knowing". It is the difference, for instance, between owning a library card and actually having read a particular book.

ARGUMENT II

POLICE WITNESSES, WHOSE PRESENCE IS PREJUDICAL AND WHOSE QUALIFICATIONS ARE INADEQUATE SHOULD NOT BE ASKED WHETHER OR NOT THEY WOULD BELIEVE THE WITNESS UNDER OATH.

The field of division in the general area of the Oath Question grows out of a bundling together of two opposite principles:

ONE – The broad, community estimation necessary for Reputation attack, and *TWO* – The sudden shift in the next question, to the personal belief of the impeaching witness in regard to the subject – witness' credibility under oath. The present status of the Oath Question is well stated by Judge Miller of the Sixth Circuit in his *Opinion* in the instant case.

> "This is a question about which the authorities are apparently much in conflict."

There is however no conflict in regard to the basic requirements needed before the highly debatable and much debated question is asked. – namely that the impeaching witness be first properly qualified. This was not done

herein and therefore they should not have been permitted to go on to the Oath Question.

But the broader question, the effect of using policemen, whose very presence implies to the jury some sort of police contact — if not police record, has a particular bearing on the Oath Question. It is submitted that under such circumstances the question is not only vain but shorn of its essence, no matter how controversial that may be, — namely personal belief. The Oath Question to witnesses who have only professional and official knowledge automatically precludes any answer but an official police answer, — or else, why was a policeman called. And since no other judgment except professional police judgment can be involved in the answer, the element of personal belief is simply not present. Here the answer is not really an answer but a statement of official position based on headquarters stance on the subject, a rather dangerous step in a very dangerous direction.

To sum up, police witnesses in cases of this type fall afoul of the law on both ends of the legal spectrum. On the end of Reputation, their base is not wide enough, being that of a professional clique rather than that of a community. On the end of Belief, their base isn't individual enough since it is a professional and official attitude based on police "means of knowing" rather than informed individual belief.

ARGUMENT III

IT WAS ERROR FOR THE DISTRICT COURT TO FAIL TO INSTRUCT THE JURY THAT THE INDICTMENT WAS NOT EVIDENCE

The Trial Court charged the jury that in determining the facts they were to consider the evidence which had been received as follows: R. 33

> "The evidence consists of the testimony of witnesses whom you have heard testify *and of the exhibits* which have been received in evidence and which will accompany you to the jury room. * * * Included in that statement of what is not evidence are the opening statements of counsel, final arguments of counsel, and any statements or arguments that have been made either by the Court or by any of the attorneys in the course of the proceedings."

The omission of the specific warning that an indictment was not evidence was compounded by a partial listing of what is not evidence, which was made additionally confusing to the lay mind of the jurors since the Court did state "* * * that the indictment will itself accompany you to the jury room and there be available for your inspection and study." At no time was the jury ever advised that the indictment was not evidence and that they were not to consider the indictment as an exhibit in the case.

The Bill of Rights contemplates that every defendant is entitled to a fair trial. Due process of law requires that the jury determine guilt from the evidence and from a correct instruction on the law from the trial judge. In order to determine whether there was due process of law in this case, we must consider the charges as given to the jury and the effect the charge as given had on the jury composed of laymen.

The question is not whether guilt may be spelled out of the record, but whether the guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the Federal Courts. *Bollembach* v. *U. S.*, 326 U.S. 750, 763. The issue is not what effect the error has on an appellate court or even this court, but rather what effect the instruction had on the mind of the jury. *Kotteakos* v. *U. S.*, 328 U.S. 750, 763, 765.

ARGUMENT IV

IT WAS ERROR FOR THE DISTRICT COURT TO FAIL TO INSTRUCT THE JURY THAT IF THE EVIDENCE FAILS TO CONVINCE THEM OF THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT THAT THEY ARE TO RETURN A VERDICT OF NOT GUILTY OR ACQUITTAL.

The Trial Court charged the jury with reference to circumstantial evidence as follows: R. 36.

> "* * * the law permits introduction of what is called circumstantial evidence. What is meant by circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged. If these facts and circumstances are sufficient to satisfy the jury beyond a reasonable doubt, *then such evidence is sufficient to authorize the jury in finding a verdict of guilty* of the crime or crimes as charged, providing you find by the requisite degree of proof the existence of all the other facts essential to constitute the crime *of which you find defendant guilty by your verdict.* Circumstantial evidence is legal and competent evidence in criminal cases if of such character *as to exclude every reasonable hypothesis other than that the de-*

fendant is guilty and is entitled to the same weight as direct testimony."

The trial court failed to give a proper charge with reference to the jury's duty in evaluating circumstantial evidence. The jury was never instructed as to the hypothesis of innocence, nor was the jury ever instructed to return a verdict of "not guilty" or "acquittal" if the requisite degree of proof was insufficient. The unfairness of the charge and the prejudicial effect of same is apparent by the undue emphasis in the manner in which the court stressed. *find the defendant guilty, three times in one paragraph.* A correct charge on circumstantial evidence is contained in the opinion of *Lamb* v. *U. S.*, 264 Federal Reporter 660, 5th Circuit, 1920, at page 664, where a case is dependent upon circumstantial evidence * * * if the evidence is of that degree of strength, then it would be your duty to convict. *On the other hand, if it does not approach that degree of strength, then it would be equally your duty to acquit him.*

The trial court prejudicially stressed the "Hypothesis of guilt" when in fact there is a duty on the trial court to place the emphasis on the "Hypothesis of Innocence." In *Hanson* v. *U. S.*, 208 F. 2d 914, the second syllabus states the proposition succinctly. * * * burden rests upon the government to prove its case not only beyond a reasonable doubt, but to the exclusion *of every reasonable hypothesis of innocence*, and the giving of only that part of the instruction relating to proof of guilt beyond a reasonable doubt constitutes error. The failure to protect the constitutional rights of the defendant in this case was set out at page 916. The trial court instructed the jury on proof of guilt beyond a reasonable doubt, but not as to proof by circumstantial evidence to the exclusion of every reasonable *hypothesis of innocence*. As a result, the appellant's

rights were not sufficiently stated by the general charge. *Epstein* v. *U. S.*, 6th Circuit, 174 F. 2d 754, 767. *Hendley* v. *U. S.*, 6th Circuit, 233 Federal 5, 19; *American Tobacco Co.* v. *U. S.*, 6th Circuit, 147 F. 2d 93.

The trial court should protect the rights of the defendant and give a proper instruction even if not requested by counsel for the defendant. *Schmeller* v. *U. S.*, 143 F. 2d 544, 552. The Supreme Court of the United States has held that even in the absence of a request for a particular charge by the defendant's counsel, the defendant is entitled to review and the appellate protection of a reviewing court. *Brasfield* v. *U. S.*, 272 U.S. 448, 1926. Failure of defendant's counsel to particularize an exception * * * does not preclude this court from correcting the error. The *Brasfield* opinion cites *Wiborg* v. *U. S.*, 163 U.S. 632, 1896, at page 658 * * * and although this question was not properly raised. Yet if a plain error was committed in a matter so absolutely vital to the defendant, we feel ourselves at liberty to correct it. *Clyatt* v. *U. S.*, 197 U.S. 207, 221, 222; *Crawford* v. *U. S.*, 212 U.S. 183, 194; *Weems* v. *U. S.*, 217 U.S. 349, 362. Rule 52 (b), Rules of Criminal Procedures.

ARGUMENT V

IT WAS ERROR FOR THE DISTRICT COURT TO INSTRUCT THE JURY AS TO THE MODE OF ITS DELIBERATION.

The District Court forbade the jurors from expressing their opinions during their deliberations until after the foreman of the jury called for balloting on the question of guilt or innocence. R. 43

> "Let me suggest that after retirement to the jury room you refrain from immediately expressing your personal views as to the guilt or innocence of the

defendant. Rather I suggest that after the selection of a foreman you express your views when requested to do so and express your view as to the guilt or innocence of the defendant only after the foreman has called for a vote on that subject. I make that suggestion because all of us have varying degrees of difficulty in withdrawing from a position prematurely stated and there is always the possibility that an injustice might result from a prenfature statement on the subject of guilt or innocence."

The trial court prejudicially invaded the province of the jury as the mode, manner, timing, extent of, and method of deliberating, was purely a function of an independent jury. The instruction was an invasion of the jury's prerogative to decide the case in the jury box without retiring and deliberating. *Pounds* v. *U. S.*, 171 US 35, 38. Our judicial system is based on a series of checks and balances and experience has indicated the wisdom of having an unfettered jury system where individual jurors can collectively decide cases according to the dictates of their own conscience. A juror has the perogative to express himself on the issues to be decided, prematurely, and isn't compelled to await the foreman's decision to call for a ballot. After a case is submitted to the panel of jurors, who is to determine what is a premature consideration and expression of opinion and what could be deemed a tardy consideration or expression of opinion? The chore of the jury in determining the guilt or the innocence of the accused is clothed in secrecy, and rightfully so, and the long arm of the trial court shouldn't be permitted to extend into and dictate the timing of their arguments and deliberations. A recent motion picture, "Twelve Angry Men" clearly demonstrates the desirability of having heated argument amongst jurors prior to balloting, which prevented a grave miscarriage of justice, ala Hollywood! ! ! A

dedicated jury, conscientiously following and adhering to the solemn oath administered to them, would be derelict in their sworn duty and gravely indifferent to their obligations if they failed to argue, express opinions, and reciprocally listen to arguments and opinions of fellow jurors before balloting. Conceivably, the jury could reach a verdict on the first ballot without any collective arguments or deliberations by following the prejudicial instruction of the trial court in the case at bar.

The Supreme Court of the United States held in *Allen* v. *U. S.*, 164 US 492 at page 501, * * * verdict must be the verdict of each individual juror, and not a mere acquiesence in the conclusion of his fellows * * * examine, question with candor and with a proper regard and deference *to the opinions of each other* * * * listen to each other's arguments * * * the very object of the jury system is to secure unanimity *by a comparison of views* and *by arguments among the jurors themselves* * * *.*

In the case of *U. S.* v. *Reid*, 210 Fed. 486, 494, the Court stated the jurors duty thusly: * * * your verdict should represent the opinion of each member of your body, *after an intelligent and conscientious comparison and consideration in the jury room of the views of the individual jurors.* * * *

Peterson v. *U. S.*, 213 Fed. 920, 924 * * * in impressing upon the jurors their duty *at all times* earnestly to endeavor, *by a candid comparison of views and fair arguments* to reach an agreement * * * and at page 925, * * * nowhere did the court make it clear that * * * an agreement should not be reached in violation of the honest convictions of anyone of the jurors. The *Peterson* opinion cites *Burton* v. *U. S.*, 196 US 283, * * * a slight thing may have turned the balance against the accused. * * *.

Defendant-appellant contends that the rationale of *Brasfield* v. *U. S.*, 272 US 448, 449, should be invoked to protect his constitutional right to a fair and impartial trial by a jury of his peers. The *Brasfield* doctrine is as follows: The jury must be permitted to arrive at a verdict without undue influence, and free of coercive tactics of the trial court. It is the duty of each juror to discuss and consider the opinion of his fellow jurors, and each juror must decide the case upon his own opinion of the evidence and upon his own judgment. The trial court's direction served no useful function and may have had a harmful effect upon the jury, the prejudice and harm done to the accused cannot be measured by a reviewing court.

Therefore, the interference with the mode, manner of deliberations, and the instruction suppressing all arguments by jurors until after the foreman called for balloting, should not have been sanctioned by the Sixth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

November 27, 1962

Before: CECIL, Chief Judge, MILLER and O'SULLIVAN, Circuit Judges.

This cause is argued by Frank J. Longano for defendant-appellant and by Thomas A. Luken for plaintiff-appellee, and is submitted to the Court.

JUDGMENT

(Filed February 4, 1963.)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ SHACKELFORD MILLER, JR.
United States Circuit Judge

No. 15034

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHNNY WALKER,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

(Decided February 4, 1963.)

(Filed February 4, 1963.)

Before: CECIL, Chief Judge, MILLER and O'SULLIVAN, Circuit Judges.

MILLER, Circuit Judge. The defendant, Johnny Walker, was found guilty by a jury under each of four counts of an indictment charging the transportation in interstate commerce with fraudulent intent of a falsely made security, in violation of Section 2314, Title 18, United States Code. He received a sentence of five years on each count, the sentences to run concurrently. This appeal followed.

The defendant testified in his own behalf denying his involvement. No other witness was called by him. After the defendant rested his case the Government called as rebuttal witnesses a Police Sergeant and an Assistant Police Chief of the Cincinnati Police Department. Each of these witnesses was asked in turn if he had the means of knowing what the defendant's general reputation was

for truth and veracity, and after answering in the affirmative, stated, over objection of the defendant, that it was bad. Defendant contends that it was prejudicial error to admit this testimony in evidence.

There is no dispute between the parties that a defendant in a criminal case has the constitutional right under the Fifth Amendment to decline to be a witness against himself and, accordingly, can elect not to testify without it creating any presumption against him. If a defendant elects not to testify in his own behalf his character or reputation for truth and veracity cannot be attacked by the Government. The parties differ as to what evidence can be offered by the Government when the defendant takes the witness stand and testifies in his own behalf, as in the present case. The defendant contends that under such circumstances the Government is limited to cross-examination of the defendant and to proof of his prior conviction of a felony or of an offense involving moral turpitude, directed to the purpose of impeaching his credibility only. *Henderson* v. *United States*, 202 F. (2) 400, 405-406, C. A. 6th, rehearing denied, 204 F. (2) 126, C. A. 6th. The Government contends that when a defendant testifies in his own behalf his credibility as a witness can be attacked, not only by proof of a prior conviction of a felony, but also by the introduction of testimony that his general reputation for truth and veracity is bad.

It is well settled law that in a criminal case the defendant's general character cannot be attacked by the Government unless evidence as to his good character is first introduced by the defendant. Accordingly, if the defendant calls character witnesses who testify to his good character in general, the Government can meet this evidence by the introduction of witnesses who contradict such testimony, but, in the absence of such character witnesses introduced by the defendant, the Government is not entitled

to introduce testimony concerning the defendant's bad character. *Michelson* v. *United States*, 335 U. S. 469, 475-479. In the present case the defendant introduced no character witnesses in his own behalf. It is his contention that the Government was accordingly not permitted to attack his character by the rebuttal testimony of the two Cincinnati police officers.

We believe, however, that the issue involves more than the application of the well settled rule above referred to and that a distinction must be drawn between (1) a defendant's general character, such as his reputation in the community wherein he lives for honesty, probity, and being a law-abiding citizen, and (2) his reputation in the community wherein he lives for truth and veracity. Although the rule above referred to is applicable when the defendant's general character is involved, we believe it is not applicable when the defendant makes himself a witness, and thus makes his reputation for truth and veracity, rather than his character in general, a matter for the jury to consider in determining his credibility as a witness.

It is well settled that although a defendant in a criminal case has the constitutional right under the Fifth Amendment to decline to be a witness against himself and, accordingly, can elect not to testify without it creating any presumption against him, yet this immunity may be waived by the defendant in offering himself as a witness. *Raffel* v. *United States*, 271 U. S. 494; *Banning* v. *United States*, 130 F. (2) 330, 337, C. A. 6th, cert. denied, 317 U. S. 695; *Henderson* v. *United States*, supra, 202 F. (2) 400, 405, C. A. 6th, rehearing denied, 204 F. (2) 126, C. A. 6th. As said in *Raffel* v. *United States*, supra, "When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. (Cases cited.) He may be examined for the purpose of impeaching his credi-

bility. * * *. His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." This Court said in the *Banning* case, supra, that when a defendant takes the witness stand in a criminal case "he sheds his cloak of constitutional immunity from self-incrimination and stands before the bar in the role of a witness and as such becomes subject to cross-examination in the same manner and to the same extent as any other witness." See also: *Fitzpatrick* v. *United States*, 178 U. S. 304, 315; *Segal* v. *United States*, 246 F. (2) 814, 818-819, C. A. 8th; *United States* v. *Lowe*, 234 F. (2) 919, 922, C. A. 3rd; *Blockburger* v. *United States*, 50 F. (2) 795, 798, C. A. 7th, affirmed 284 U. S. 299, 304-305.

Although the foregoing cases deal specifically with the right to cross-examine a defendant who elects to become a witness in his own behalf, we think it is clear from those cases that impeachment of a defendant so testifying is not limited to cross-examination and that he is subject to impeachment as any other witness would be. In *Reagan* v. *United States*, 157 U. S. 301, 305, the Supreme Court said that if a defendant testifies in his own behalf, "His credibility may be impeached, and by the same methods as are pursued in the case of any other witness." This Court specifically so stated in *Banning* v. *United States*, supra, 130 F. (2) 330, 337, C. A. 6th. See also: *Fitzpatrick* v. *United States*, supra, 178 U. S. 304, 316; *Berra* v. *United States*, 221 F. (2) 590, 597, C. A. 8th; affirmed 351 U. S. 131; *Steele* v. *United States*, 243 F. (2) 712, 714, C. A. 5th. Cross-examination is allowed because it is one way of impeaching the credibility of a witness. But other methods are also well recognized and used for that purpose. Accordingly, we think it logically follows that the credibility of a defendant as a witness can be impeached in any of the

ways which are recognized and used for the impeachment of any witness. In addition to cross-examination, other well recognized methods of impeachment are proof that the witness has been previously convicted of a felony. *Henderson* v. *United States*, supra, 202 F. (2) 400, 405, C. A. 6th, testimony showing previous statements which are contradictory to what the witness has testified to before the jury, *The Seeandbee*, 102 F. (2) 577, 581, C. A. 6th; *Duarte* v. *United States*, 171 F. (2) 971, 972, C. A. 5th, and testimony that the reputation of the witness for truth and veracity is bad. *Swafford* v. *United States*, 25 F. (2) 581, 584, C. A. 8th; *Sawyer* v. *United States*, 27 F. (2) 569, 570, C. A. 9th; *Hayden* v. *Commonwealth*, 140 Ky. 634, 636-637; *Creekmore* v. *Crossno*, 259 F. (2) 697, 698, C. A. 10th.

Applying the foregoing legal principles to the present case, we are of the opinion that it was not error for the District Judge to receive in evidence the testimony of the two police officers that the general reputation of the defendant for truth and veracity was bad. *Miller* v. *United States*, 288 F. 816, 818, C. A. 5th; *Hyche* v. *United States*, 135 F. (2) 44, C. A. 5th. In *Underhill's Criminal Evidence, Fourth Edition, Section 423*, it is said, "Either state or defendant may always introduce independent evidence tending directly to show that a witness for the opponent possesses a bad reputation for veracity to impeach such adverse witness after he has been examined in chief by the party calling him." This statement is supported by numerous cases from the State courts, cited in a note. In Section 167 of the same work, the distinction is drawn between a defendant's general reputation for truth and veracity and his character in general. Reference is also made in *Vol. 98, Corpus Juris Secundum, Subject, Witnesses, Section 494*, to numerous State court cases holding that when the defendant becomes a witness impeaching

evidence is admissible to prove that his general reputation for truth and veracity is bad, although evidence is not admissible to show that his general character is bad. The same rule and the same distinction between reputation for truth and veracity as a witness and character in general is stated in *Vol. III, Wigmore on Evidence, Third Edition, Sections 890 and 925.*

One of the two witnesses, after stating that defendant's general reputation for truth and veracity was bad, was asked if, based on his knowledge of the defendant's general reputation for truth and veracity, he would believe the defendant under oath. The other witness, after so testifying, was asked, "and would you believe the defendant under oath?" Both witnesses answered over objections by the defendant, they would not. Defendant contends that the admission in evidence of these answers was reversible error.

This is a question about which the authorities are apparently much in conflict. In *Underhill's Criminal Evidence, Fourth Edition, Section 423*, it is stated in the text, "A witness who is called to prove the bad reputation of another may, after he has testified to that reputation, be asked if he would believe the witness under oath." In the note in support of the statement numerous State court authorities are cited, although numerous other authorities are also cited as supporting the contrary rule. In *Teese v. Huntingdon*, 23 Howard (64 U. S.) 2, 11-13, the Court refers to this conflict in the authorities and to the view expressed by Mr. Greenleaf that the weight of authority in the American courts is against allowing a question to be put to the impeaching witness whether he would believe the other on his oath, and to the contrary view expressed in Taylor on Evidence that the opinion of the impeaching witness, as to whether the opposing witness is entitled to be believed on his oath, is admissible to the jury.

In *Hamilton* v. *People*, 29 Mich. 173, 186-188, the Supreme Court of Michigan strongly criticized the view of Mr. Greenleaf and undertook to show that the weight of authority in the American courts was not as stated by him and that the cases relied upon by him did not support his statement. In that case the evidence was held admissible. This ruling was thereafter followed in *Keaton* v. *People*, 32 Mich. 484, and *People* v. *Bailey*, 151 Mich. 187, 190. In *Ford* v. *Ford*, 7 Humphrey (Tenn.) 91, 101, the Supreme Court of Tennessee referred to the view expressed by Mr. Greenleaf and declined to follow it. In *Hills* v. *Wylie*, 26 Ohio State, 364, the Supreme Court of Ohio also referred to the view expressed by Mr. Greenleaf and stated that an examination of the authorities led it to a different conclusion. It held that the question was a proper one. In *Foure* v. *Commonwealth*, 205 Ky. 65, 68, the Kentucky Court of Appeals approved the subject matter of such a question, but criticized the form there used. See also *Boades* v. *Katzman*, [illegible] Ky. 190, 195-196.

In three early cases in Federal District Courts it was held that it was not error to ask an impeaching witness, after testifying that the general reputation for truth and veracity of an opposing witness was bad, whether, from his knowledge of that general reputation he would believe the witness on oath. *Patriotic Bank* v. *Coote*, Federal Cases No. 10,807 (1827), Dist. Columbia; *United States* v. *Masters*, Federal Cases No. 15,739 (1834), Dist. Columbia; *United States* v. *Vansickle*, Federal Cases No. 16,609 (1840), District of Mich. In *Held* v. *United States*, 260 F. 932, C. A. 5th, such evidence was held admissible. This also appears to be the ruling in *Swafford* v. *United States*, supra, 25 F. (2) 581, 584, C. A. 8th.

In *Colbeck* v. *United States*, 10 F. (2) 401, 403, C. A. 7th, the Court expressed the opinion that the weight of authority was against the admissibility of such evidence.

although such authorities were not cited and apparently the Court relied in part upon the statement of Mr. Greenleaf hereinabove referred to.

In *Colbeck* v. *United States*, 14 F. (2) 801, 803-804, C. A. 8th, the Court referred to Greenleaf on Evidence, but based its ruling that the evidence was not admissible on the ground that the first question propounded dealt with the reputation for *honesty* and veracity of the witness being impeached and was too broad a basis upon which to rest the second question as to whether the witness would testify falsely. It also held that even if erroneously excluded, it was not prejudicial error. It will also be noticed that this ruling was prior to the Court's subsequent ruling in *Swafford* v. *United States*, *supra*, 25 F. (2) 581, C. A. 8th.

An interesting discussion of this question is found in *Vol. VII, Wigmore on Evidence, Third Edition, Section 1985*. The author points out that it is inconsistent to hold that evidence as to a witness's character is restricted to evidence concerning his general reputation with respect thereto and to allow the impeaching witness to give his individual opinion as to whether he would believe the witness on oath; yet only a minority of the states, with particular reference to Connecticut, Iowa, Maine, Massachusetts and North Carolina, exclude such evidence. The majority of the states, using one reason or another, and according to the author often ruling illogically, apparently permit such testimony to be introduced. We recognize the merit of the statement in the text that it is not always easy to say what is the accepted law of a given jurisdiction.

Under the circumstances, we think it is advisable to follow what appears to us to be the majority rule and to hold such evidence admissible.

Defendant also contends that the District Judge erred in not instructing the jury that the indictment was not evidence and in incorrectly instructing the jury with respect

to circumstantial evidence. No request was made for specific instructions on these issues and no objection was made to the instructions as given. The evidence as to defendant's guilt was strong. In our opinion the instructions considered as a whole covered these issues and were not prejudicially erroneous. *Rule 30, Rules of Criminal Procedure; Garner* v. *United States*, 244 F. (2) 575, C. A. 6th, cert. denied 355 U. S. 832; *Holland* v. *United States*, 348 U. S. 121, 139-140; *Continental Baking Company* v. *United States*, 281 F. (2) 137, 146, C. A. 6th.

Nor do we find any prejudicial error in the suggestion of the District Judge to the members of the jury that after retirement to the jury room they refrain from immediately expressing their views as to the guilt or innocence of the defendant, and that an expression of such views be delayed until the foreman called for a vote on the subject. This was a suggestion, not an instruction or order, and was accompanied by a logical statement of the reason therefor. We believe it was helpful in the reaching of a proper verdict.

The judgment is affirmed.

ORDER

(Filed March 25, 1963.)

Appellant's petition for rehearing has been considered by the Court.

This Court ruled in affirming the judgment on appeal that, as a matter of law, the testimony in rebuttal of two police officers that the general reputation of the appellant for truth and veracity was bad, was admissible in evidence. The petition for rehearing contends for the first time that the police officers were not shown to be qualified to give such testimony.

The objection made to their testimony in the District Court was not based on that ground. The witnesses were not cross-examined in an effort to sustain such an objection on that ground. The appeal presented to this Court merely the question of the admissibility of such testimony, without raising the question whether the witnesses were qualified to give such testimony. If the objection had been based on the ground now contended, the appellee would have had the opportunity of meeting it by additional testimony in the District Court. *Cold Metal Process Co. v. McLouth Steel Corporation*, 170 F(2) 369, 380, C. A. 6th; *Lively v. Elkhorn Coal Co.*, 206 F(2) 396, 399, C. A. 6th.

The contention now made by the petition for rehearing was not made by appellant either by brief or in oral argument on this appeal. It is not now an issue in the case *N.L.R.B. v. Kentucky Utilities Co.*, 182 F(2) 810, 814, C. A. 6th; *Grand Trunk Western R. Co. v. H. W. Nelson Co.*, 116 F(2) 823, 830, C. A. 6th.

It is ordered that appellant's petition for rehearing be denied.

Approved for entry,

s/ SHACKELFORD MILLER, JR.
Circuit Judge.

CERTIFICATE OF CLERK

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

I, Carl W. Reuss, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the appendices and proceedings in the case of United States of America vs. Johnny Walker, No. 15,034, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 17th day of April, A.D. 1963.

CARL W. REUSS
Clerk of the United States Court of Appeals
for the Sixth Circuit.

(SEAL)